

**RUSSELL O'MEARA**  
Claimant

**ROBERT C. BOUCK, JR.**  
Respondent

**RIVERPORT INSURANCE CO.**  
Insurance Carrier

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

The ALJ awarded claimant a 15 percent whole body functional impairment and a 69.5 percent work disability for injuries to his low back and right leg/hip. The ALJ found

there was insufficient evidence to prove claimant needs future medical treatment, and denied same.

Respondent contends claimant is not entitled to a work disability and should be limited to a 5 percent whole person functional impairment to his low back, arguing claimant's lower extremity impairment is limited to the leg and not the hip, and a scheduled injury cannot be combined with an unscheduled injury to reach the greater than 7.5 percent body as a whole threshold for work disability required under K.S.A. 44-510e(a)(2)(C)(i).

Claimant contends the Award should be reversed with regard to the denial of future medical benefits, but affirmed in all other respects.

The issues on appeal are:

1. What is the nature and extent of claimant's impairment? Is claimant's impairment in the right lower extremity limited to the leg or does it also include the hip?
2. Did the ALJ err by combining an unscheduled 5 percent body as a whole impairment with a scheduled injury impairment to arrive at a permanent partial body as a whole impairment in excess of 7.5 percent, thereby meeting the threshold for a work disability?
3. Is claimant entitled to future medical benefits pursuant to K.S.A. 2013 Supp. 44-510h(e)?

#### **FINDINGS OF FACT**

Claimant worked as a house painter for respondent. On June 10, 2013, claimant fell from a roof, suffering a comminuted proximal femoral fracture to the right lower extremity and a soft tissue injury to his low back. Claimant contends the injury to his right lower extremity also included his hip, which respondent denies. Additionally, respondent contends the functional impairment to claimant's right lower extremity cannot be combined with the low back impairment to reach the greater than "7.5 percent to the body as a whole" impairment required in K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i) for a work disability.

Claimant testified he began working with respondent painting houses for a summer around 2000. As time went on they helped each other on jobs and considered themselves to be a crew of remodelers. When claimant was offered work with respondent he was living in Kansas and the business was located in Kansas.

In June 2013, respondent contacted claimant about a job which paid \$20 an hour for the duration of the job. On June 10, 2013, claimant was injured when he fell off a ladder. When he regained consciousness, claimant remembers being in the ambulance and being asked if they could cut his boots off.

Claimant saw Ely Tamano, M.D., on June 15, 2013, who determined claimant sustained a fracture of his femur from the fall. Dr. Tamano diagnosed among other things: status post right femur nailing and fixation surgery; and recent traumatic injuries.<sup>1</sup>

When claimant was released from the hospital he was sent to work hardening. Claimant indicated that while in work hardening he reinjured himself. He thought the work hardening was too much too fast. He did not feel he healed enough to go to work hardening. Claimant underwent a second surgery after work hardening. Claimant testified work hardening caused stress on his leg.

Claimant does not recall much of what happened, but does remember Dr. Black giving him temporary work restrictions in April 2014. Respondent offered claimant work, but he turned it down because he did not feel he was up to it. Claimant received permanent restrictions in June 2014. Claimant has not worked since the accident.

Claimant complains of pain in his right groin, into the ball socket area of his right hip and pelvis and the bone leading from the main part of the femur to the ball socket and up to the lower back. Claimant described the pain as sharp, with any movement involving extreme turning to the right, left, forward or back and sitting too long. Claimant testified his hip pain has been as bad as a 7 out of 10 and at best, a 2 out of 10. Claimant testified that when he sits, the pain starts in his groin and goes to his back as he leans forward. If he leans back, the pain starts in his back and goes to the back of his pelvis. When referring to the pain in his femur, claimant indicated his leg aches quite a bit, especially with weather changes, and goes halfway down the femur. Claimant denies any problems or complaints to his right leg, right pelvis or low back prior to June 2013.

Claimant's pain causes problems with endurance when walking and sitting, showering and other activities of daily living. Claimant testified that when the weather is nice he can walk a little more than 3/8 of a mile. He has to change position regularly because of pain. He indicated that a reclined back position is the most comfortable for him.

Claimant testified he does not mow his grass, but does all the cooking for himself and his daughters and he does the laundry. He does not go upstairs in his home except to shower. His daughters are responsible for keeping the bathroom and their room clean. Claimant has difficulty going down stairs. Claimant can no longer work on his truck and he can no longer work as a blacksmith because of the lifting required.

Claimant had three injections with Dr. Kahn. The first provided no relief. The second helped marginally and the third, which was given closest to the spine, provided the most benefit. Claimant had two and a half to three weeks of relief from the last injection.

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<sup>1</sup> *Id.*, Ex. 1.

Claimant met with Edward Prostic, M.D., on January 7, 2014, for examination, at the request of his attorney. Claimant had already received a significant amount of medical treatment, including surgery on June 11, 2013. Claimant complained of difficulty with his right hip and knee. His hip pain was mainly near his buttock and was worse with standing, weight-bearing and walking. His knee pain was anterior and superomedial and he had difficulty on stairs and with squatting and kneeling. Claimant reported being unable to run, jump or dance.

Dr. Prostic found claimant to have a mild antalgic gait, favoring the right lower extremity. Claimant had no significant tenderness in his right hip, but there was significant tenderness near the locking screws at the knee. Claimant's range of motion in his hip was full and fluid. Range of motion in claimant's knee was complete with mild crepitus. He also had mild hamstring tightness.

Dr. Prostic noted claimant sustained a comminuted subtrochanteric fracture of his right hip that had not yet healed. He suggested claimant have a repeat fixation and possible bone grafting. He felt claimant was unable to return to work as a laborer at that time. He opined the work accident was the prevailing factor in the injury, medical condition and need for medical treatment.

On February 7, 2014, Dr. Prostic determined claimant was not at maximum medical improvement (MMI) and anticipated an additional surgery would be required to achieve healing of the femoral fracture. Claimant had a second surgery on February 18, 2014, to replace the titanium rod and screws. The last time claimant saw the surgeon, was on June 5, 2014. Claimant was released at MMI, with restrictions of no lifting more than 25 pounds, no ladders, no roofs and a four hour work day.

Claimant met with Dr. Prostic again on July 8, 2014, at which time he continued to have aching in his hip anteriorly and posteriorly. Claimant had significant tenderness about the greater trochanter and a decrease in circumference of the right thigh as compared to the left.

Dr. Prostic opined claimant appeared headed to solid healing. Dr. Prostic suggested claimant have a steroid injection to the trochanteric bursa and if it provided no relief, claimant should continue with light work duty. He also suggested claimant do rehabilitative exercises, such as spinning on an exercise bicycle. Claimant reported three injections with Dr. Kahn in three different areas: the greater trochanter, the hip joint and the sacroiliac joint. Claimant noted no significant relief.

On September 15, 2014, Dr. Prostic wrote if claimant had good pain relief from a steroid injection to the trochanteric bursa he could return to medium-level employment. If the response was not good, claimant would continue to be on light duty until the hip fracture healed and his leg was rehabilitated. Dr. Prostic felt that spinning on an exercise bicycle would most likely help restore claimant's atrophied thigh.

Dr. Prostic testified he was not surprised claimant's complaints had progressed when claimant saw Dr. Koprivica on June 5, 2015, because subtrochanteric fractures are a real problem and there was not always the proper hardware to treat them. Even now, with better hardware, these fractures are hard to heal and he believed claimant was still not healed. Dr. Prostic assigned claimant a 15 percent whole body impairment (5 percent to the lumbar spine and 10 percent to the lower extremity), utilizing the 4th Edition of *AMA Guides*.

Dr. Prostic opined that, until claimant has evidence of solid healing of his hip fracture, he would need light duty restrictions, including avoidance of frequent bending or twisting at the waist and the ability to change positions as necessary for comfort. He also wrote that if claimant had an established non-union, other treatment considerations would be a bone growth stimulator or autologous bone grafting to the fracture.

Dr. Prostic indicated that if he simply rated the lower extremity, claimant would have a 25 percent lower extremity functional impairment.

Dr. Prostic reviewed the task list of Terry Cordray and opined claimant could no longer perform 19 out of 22 tasks for an 86 percent task loss. Dr. Prostic indicated that if claimant's hip can become healthy, his back complaints may go away. Should the hip heal and the back improve significantly, claimant would move to the medium level of work, which would change his restrictions and would alter his task loss.

Claimant continued to have pain after he was released. He testified the problem with his knee went away after the second surgery and his right foot was put back into proper alignment after the second surgery, but his right groin and low back problems remained. Claimant's third injection on December 18, 2014, was the last treatment claimant received for the accident. Claimant decided, upon the advice of Dr. Kahn, to not continue with injections, because they were possibly only masking his pain.

Claimant has not worked since the accident, and has made no attempt to return to light duty. Claimant did speak with respondent in April about returning to work in some capacity, but this was the only time they spoke. Claimant feels he can no longer work or do things he likes to do and his injury impedes his ability to spend time with his daughters. Claimant is only taking aspirin for his pain.

Claimant was still in treatment with Dr. Black from April 2014 through June 5, 2014. He was not yet at MMI and continued to receive temporary total disability benefits until June 5, 2014.

Claimant met with P. Brent Koprivica, M.D., on June 5, 2015, for a court-ordered independent medical examination (IME) to determine what injuries claimant sustained on June 10, 2013, the prevailing factor and percentage of impairment for those injuries and appropriate restrictions.

Claimant's complaints were low back pain and right hip pain, severe right groin pain radiating through his right buttocks and right lower back area, popping in his right hip and an altered gait with limited stride on the right, with a limp. Claimant reported feeling like he was protecting his right lower extremity by favoring the left lower extremity. Dr. Koprivica noted claimant did not volunteer any right knee complaints or any complaints regarding the history of closed head trauma or residuals.

Claimant demonstrated low back pain during the examination. Claimant also exhibited severe right groin pain with squatting. Dr. Koprivica opined claimant suffered a work injury on June 10, 2013, which represents the direct, proximate and prevailing factor in claimant's ongoing impairments involving the low back and right hip. He found probable sacroiliac joint contribution to claimant's low back pain and, separately, claimant's altered gait also contributed. He noted claimant did not have significant hip pain and had no complaints of significance regarding the closed head trauma.

Dr. Koprivica found claimant to be at MMI for the June 10, 2013, work injury. He opined the medical care and treatment claimant received for the work injury was medically reasonable and a direct necessity in an attempt to cure and relieve claimant of the effects of the permanent injuries. He opined the prevailing factor in the documented comminuted proximate femoral fracture, the chronic impairment and chronic low back pain, is the work injury of June 10, 2013.

Dr. Koprivica assigned the following impairment: 5 percent whole person impairment for soft tissue injury to the low back with chronic pain as a contributor along with the sacroiliac arthralgia; 25 percent lower extremity impairment for the femoral fracture and chronic right hip pain; 25 percent lower extremity impairment for weakness and based on the nonunion and need for revision surgery. The lower extremity impairments were converted to 10 percent to the whole person and combined the other whole person impairment for a 15 percent whole person impairment.

Dr. Koprivica restricted claimant to ground level activities, was instructed to avoid stairs or heights, avoid prolonged standing or walking activities, standing and walking a maximum of one hour, captive sitting should be limited to two hour intervals, should change between activities based on tolerances, restricted squatting, crawling and kneeling tasks and no lifting or carrying more than 25 pounds.

Dr. Koprivica reviewed the task list of vocational specialist Terry Cordray and opined claimant could no longer perform 19 out of 22 tasks for an 86 percent task loss regarding claimant's global complaints. Dr. Koprivica opined claimant could no longer perform 13 out of 22 tasks for a 59 percent task loss regarding only claimant's back complaints.

Dr. Koprivica testified it is more probably true than not that claimant will need future medical treatment, most likely involving the hip, as that is where the biggest risk is.

Claimant met with Terry Cordray, a vocational rehabilitation counselor, for a vocational assessment on December 9, 2014. Mr. Cordray noted that all of the work claimant performed before the accident was heavy physical work. Mr. Cordray reviewed claimant's medical records and determined claimant's lack of keyboard skills and software training for clerical occupations limited his ability to access sedentary or lighter types of jobs. Claimant reported not working since June 10, 2013. He had been offered light duty work, but did not feel he was medically capable at the time. He has not applied for work since June 2014, the date of his last surgery, again because he did not feel he was medically capable.

Claimant continued to have constant pain in his right hip, to the joint. The pain required he alternate between sitting and standing and avoid prolonged walking and walking on uneven surfaces. He could lift no more than 20 pounds, could sit for approximately 30 minutes and could stand for approximately 30-40 minutes. He reported squatting and stooping to be painful, climbing stairs was difficult and slow and he could not climb ladders. He also had a hard time sleeping because he could not find a comfortable position. Claimant is able to do light housework, but no yard work. He is no longer able to enjoy his hobbies of hiking, camping, fishing and hunting.

Mr. Cordray identified 22 prior tasks performed by claimant. Claimant was earning \$20 per hour at the time of the injury. Mr. Cordray opined that the restrictions of all of the physicians, with the exception of Dr. Zarr, precluded claimant from performing any of claimant's past jobs. Mr. Cordray opined that, at the light physical demand category, claimant would be limited to jobs that require only a high school education, such as retail sales jobs.

Mr. Cordray felt claimant needed to be redirected to vocational rehabilitation for counseling and retraining. He acknowledged it would be a physical and psychological adjustment for claimant.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

Claimant suffered a serious fall on June 10, 2013, while working on a roof for respondent. That fact is not denied. The functional extent of claimant's injuries is also not in dispute. Respondent's defense in this matter stems from whether and how those functional impairments are combined.

K.S.A. 2013 Supp. 44-510d(a)(b)(16) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto. The injured employee may be entitled to payment of temporary total disability as defined in K.S.A. 44-510c, and amendments thereto, or temporary partial disability as defined in subsection (a)(1) of K.S.A. 44-510e, and amendments thereto, provided that the injured employee shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total or temporary partial disability as provided in the following schedule,  $66\frac{2}{3}\%$  of the average weekly wages to be computed as provided in K.S.A. 44-511, and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...  
(16) For the loss of a leg, 200 weeks.

K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i) states:

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds  $7\frac{1}{2}\%$  to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

Respondent contends claimant's injuries to his right leg fall under the scheduled injury statute and cannot be combined for the purposes of K.S.A. 2013 Supp. 44-510e. Respondent argues claimant suffered only a leg injury with no hip involvement. Claimant contends the injury involved his right hip, thus, taking it out of the scheduled injury arena. Claimant further argues the injury directly involved the right hip, which would qualify as a whole body impairment.

The ALJ noted both Dr. Prostic and Dr. Koprivica rated claimant's impairment to the hip and not the leg. Additionally, claimant testified to ongoing hip pain as the direct result of this injury. The Kansas Supreme Court has long held it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits in Kansas.<sup>2</sup> The Board finds claimant suffered injury and disability to his right hip as the result of the June 10, 2013, work-related accident.

Even if respondent's position were supported by this record, the Kansas Supreme Court has also ruled that if an injury is both to a scheduled member and to a non-scheduled portion of the body, compensation should be awarded under K.S.A. 44-510e.<sup>3</sup> Respondent has presented no persuasive argument that this ruling by the appellate courts has been overturned or modified.

The parties have stipulated to the ratings of both Dr. Prostic and Dr. Koprivica that claimant suffered a 5 percent functional whole body impairment to his low back and a 25 percent lower extremity impairment to his lower right extremity, which converts to a 10 percent whole body impairment. The combination of those ratings results in a 15 percent whole body functional impairment which satisfies the minimum requirements of K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i). Claimant is entitled to receive a work disability for his injuries.

As noted above, the parties stipulated to the functional impairment ratings, task loss percent and wage loss percent utilized by the ALJ. The award by the ALJ of a 15 percent whole body functional impairment followed by a 69.5 percent work disability is affirmed.

The ALJ determined claimant reached MMI and the medical evidence was insufficient to overcome the presumption contained in K.S.A. 2013 Supp. 44-510h(e). The Board agrees and affirms the ALJ's finding that claimant failed to overcome the statutory presumption contained therein. Claimant's entitlement to future medical treatment is denied.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has proven he suffered injuries to his low back and right lower extremity, including his right hip as the direct result of the June 10, 2013, work-related fall. The prevailing factor for claimant's injuries and resulting disabilities is the June 10, 2013, fall. Claimant has failed to overcome the presumption contained in

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<sup>2</sup> *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984); *Bryant v. Excel Corp.* 239 Kan. 688, 722 P.2d 579 (1986).

<sup>3</sup> *Bryant* 239 Kan. at 689; *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 731, 235 P.3d 484 (2009).

K.S.A. 2013 Supp. 44-510h(e) that it is more probably true than not that additional medical treatment will be necessary, as claimant has reached MMI.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 4, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2016.

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BOARD MEMBER

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